

1990

State of Utah v. Channan S. Singh : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

UTAH

MENT

CH 7-11A

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

DOCKET NO.

THE STATE OF UTAH,

:

Plaintiff/Appellee,

:

v.

:

CHANNAN S. SINGH,

:

Case No. 900497-0

Priority No. 2

Defendant/Appellant.

:

BRIEF OF APPELLANT

Appeal from a judgment and conviction for Forgery, five counts, all second degree felonies, in violation of Utah Code Ann. § 76-6-501 (1990), with one count enhanced pursuant to Utah Code Ann. § 76-8-1001, -1002 (1990) (habitual criminal), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

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FILED

JAN 14 1991

CLERK OF THE COURT

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
CHANNAN S. SINGH,	:	Case No. 900497-CA
Defendant/Appellant.	:	Priority No. 2

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v.	:	
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JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 77-35-26(2)(a) (Supp. 1989) and Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989), whereby a defendant in a district court criminal action may take an appeal to the Court of Appeals from a final judgment and conviction for any crime other than a first degree or capital felony.

STATUTES AND CONSTITUTIONAL PROVISIONS

The pertinent parts of the following statutes and constitutional provisions are provided in Addendum A:

Utah Code Ann. § 41-2-102(13)
Utah Code Ann. § 41-2-111(1)
Utah Code Ann. § 41-2-133(1)
Utah Code Ann. § 41-2-133(2)
Utah Code Ann. § 41-2-404
Utah Code Ann. § 76-1-30
Utah Code Ann. § 76-1-105
Utah Code Ann. § 76-1-402(3)(a)
Utah Code Ann. § 76-1-402(4)
Utah Code Ann. § 76-4-101
Utah Code Ann. § 76-6-408(1)
Utah Code Ann. § 76-6-412(1)(c)
Utah Code Ann. § 76-6-501(1)
Utah Code Ann. § 76-6-501(2)
Utah Code Ann. § 76-6-501(3)(a)

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. For a "writing" to constitute a forgery, must it first evidence the existence of a legally enforceable right or privilege? (i.e. Is "legal efficacy" a necessary element of forgery?). Since this issue involves a question of law, "we [appellate courts] accord conclusions of law no particular deference, but review them for correctness." Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985).

2. Did the trial court err when it refused to instruct the jury on the defendant theories of the case (which included lesser included offense instructions)? Where "the requested instruction is denied, no prejudicial error occurs if it appears that the giving of the requested instruction would not have affected the outcome of the trial." State v. McCumber, 622 P.2d 353, 359 (Utah 1980).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a judgment and conviction for Forgery, five counts, all second degree felonies, in violation of Utah Code Ann. § 76-6-501 (1990), with one count enhanced pursuant to Utah Code Ann. § 76-8-1001, -1002 (1990) (habitual criminal), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, Judge, presiding.

Defendant Channan Singh initially moved to quash the bindover to the circuit court, alleging that there was insufficient evidence for trial. (R 22-26). Mr. Singh later moved to dismiss the Information for reasons similar to those stated in his motion to quash (the evidence revealed at the preliminary hearing would not

satisfy each and every element of forgery). (R 31-38). Mr. Singh renewed his motion before trial, (T 2-18), and again, following the State's case-in-chief. (T 81). The court rejected these motions and his exceptions to the jury instructions. (T 84-85).

STATEMENT OF THE FACTS

On November 27, 1989, West Valley Detective Holly Wright went to 4014 Benview Drive to buy a driver's license from an unnamed individual. (T 55-56). The individual was not there although another individual, Channan Singh, sold Detective Wright two temporary driver's permits for \$100. (T 56-57); see State's Exhibit 1; Addendum B.

Filled in on each permit were the expiration date, the signature for the examiner and the director, the results of the examination, and a restriction notation. (T 57-58); see State's Exhibit 1. The Detective did not see Mr. Singh nor anyone else fill out the partially completed licenses. (T 68). Left blank on each permit were spaces for the name, address, birth date, height, weight, sex, eye color, and signature of the licensee. (T 67); see State's Exhibit 1.

Detective Wright testified that the partially completed licenses, in the form as sold to her, were not valid temporary permits. (T 68); see State's Exhibits' 1-3 (specifically stated on the temporary driver's license is the notation, "Not Valid Without Licensee's Signature"); see also (T 79) (wherein Detective Mays testified that permits without "information as to the identity of

the person" would not be valid); cf. (R 32) ("At the preliminary hearing Officer Holly Wright and Detective Carroll Mays testified that the partially completed forms were not useable as temporary permits").

On December 7, 1989, Detective Wright purchased two more temporary driver's licenses from Mr. Singh for \$100. (T 59-60). The spaces filled in and left blank on the second set of licenses were consistent with the markings and omissions on the first set of licenses. Compare State's Exhibit 1 with State's Exhibit 2. Detective Wright did not see anyone write on the second set of permits, and admitted that their incomplete condition would not make them valid. (T 69-70).

On December 12, 1989, Detective Wright and Detective Mays bought 15 blank driver's licenses from Mr. Singh for \$400. (T 75-77). After Detective Mays indicated that he did not know how to complete them, Mr. Singh filled out the signature lines for the director and examiner and then marked some results on the examination section. (T 76-77). In addition, Mr. Singh instructed both detectives on how to fill out the remainder of the form. (T 72, 77). None of the temporary licenses, however, were fully completed by Mr. Singh. See State's Exhibits 1-3.

The State charged Mr. Singh with five counts of forgery. (R 7-11); (T 20-21). During the lower court proceedings, Mr. Singh moved to dismiss the charges, arguing, inter alia, that the invalid and incomplete licenses would not (or did not) support the forgery

charges. See (R 22-26) (Motion to Quash and accompanying memorandum); (R 31-38) (T 2-18) (Rule 12 Motion to Dismiss the Information); (T 81) (Motion to Dismiss). Mr. Singh also excepted to the court's refusal to charge the jury with his theories of the case or the lesser included offenses. (T 110-18). The trial court denied Mr. Singh's motions and refused his instructions. (T 18, 85, 110).

SUMMARY OF THE ARGUMENT

A forged "writing" must evidence the existence of a legally enforceable right or privilege. The writing must also appear to have been issued by the government. If a driver's license appears facially invalid (despite the addition of signatures or markings by the defendant), no forgery took place because the admittedly invalid and incomplete license would not evidence the privilege to operate a motor vehicle. The government would not issue a partially completed license and allow the licensee to fill in the blank spaces. Viewing the evidence in a light most favorable to the State, the licenses were not, nor did they purport to be a "writing issued by a government."

The trial court also erred when it rejected the defendant's proposed jury instructions. The jury should have been able to consider whether the defendant completed the crime of forgery or took only a "substantial step." Forcing the jury to choose between forgery or acquittal was improper when other reasonable choices existed.

ARGUMENT

POINT I

SINCE A FORGED "WRITING" MUST BE COMPLETE, THE EVIDENCE COULD NOT HAVE SUPPORTED THE FORGERY CONVICTIONS

Prior to trial and, again, following the State's case-in-chief, Defendant/Appellant Channan S. Singh moved to dismiss the charges, alleging, *inter alia*, that since the involved licenses were facially incomplete they could not be considered forgeries. (R 31-38); (T 2-18). Because the licenses were mostly blank they would not have, nor purport to have "legal efficacy" (i.e. the writing must be complete enough to evidence a legally enforceable right or privilege).¹ *See* (R 32-34). A forged "writing" would exist only when, and if, a third party filled in the blank spaces.

In response, the State argued that the forgery statute did not require proof of a completed writing. (T 11); Utah Code Ann. § 76-6-501. Instead, the State alleged, all it had to prove was a transfer of a writing. (T 11-12). Hence, while neither party disputed that a "writing" had to exist, the parties did disagree on whether forgery required a completed writing or whether it was enough for the license to be partially completed.

The trial court sided with the State, reasoning: "The statute indicates [that it is a forgery if a person acts] 'with knowledge that he is facilitating a fraud', all you've got to do is know that the document that you are transferring is capable [of] and

¹ *See infra* note 3.

probably will be used in facilitating a fraud." (T 14) (emphasis added). Despite the court's reference to "the document," the question left unanswered (though later rejected by the court) was whether "the document" had to be a completed document.

The State introduced five² partially completed "Utah State Department of Public Safety Driver License Temporary Counter Permit[s]" as evidence of the alleged crimes. See State's Exhibits 1-3; (T 58, 61, 78). The Operators' License Act defines "license" as "the privilege issued under this chapter to operate a motor vehicle." Utah Code Ann. § 41-2-102(13); cf. Utah Code Ann. § 41-2-111(1). Similarly, a forged writing includes "symbols of

2 Four licenses were already partially filled in by an unknown individual prior to their purchase by the detective. See State's Exhibits 1 and 2. Detective Wright did not see or know who had marked the licenses. (T 68-70). Moreover, since the State offered no evidence to show that the signatures and markings on the first four licenses were not in fact completed by the authorized individuals at a proper time or place, Mr. Singh's conduct in simply selling (but not writing on) the four licenses would not constitute the crime of forgery. See Utah Code Ann. § 76-6-501. But cf. Utah Code Ann. § 76-6-408 (Theft by Receiving Stolen Property). Insufficient evidence therefore existed for the first four counts of forgery as the State failed to prove beyond a reasonable doubt that the first four licenses were fraudulent. (i.e. If, as the jury must have necessarily found, the government would issue partially completed licenses, (R 101-11, 120-24), Mr. Singh may have only stolen such government writings and then attempted to sell them. Cf. Utah Code Ann. § 76-6-408; see infra Point II.C.). When State's Exhibit 3 (the license Mr. Singh partially filled in) is compared with State's Exhibits 1 and 2, the stylistic differences reveal that Mr. Singh did not mark the first four licenses. Compare State's Exhibit 1 and 2 with State's Exhibit 3 (unlike the four licenses already filled in, Mr. Singh's license listed the director and examiner as the same person; Mr. Singh did not complete the restriction space or the expiration date; and Mr. Singh's penmanship is different).

value, right, privilege, or identification." Utah Code Ann. § 76-6-501(2); (R 111). Because the State classified the forgeries as second degree felonies, it was also required to prove that the writing was (or purportedly had been) "issued by a government, or any agency thereof[.]" Utah Code Ann. § 76-6-501 (3); (T 14); (R 102, 104, 106, 108, 110). As discussed below, the necessary implications of the these statutory provisions required the "writing" to be (or appear) complete.³

If, as in the case at bar, a "writing" contained blank spaces, it would have no legal effect and could not be considered a governmentally issued instrument. Cf. State v. Ortega, 418 N.W.2d 57 (Iowa 1988); (T 4-5, 8, 13-14). In Ortega, the State argued that creating blank driver's license forms should be criminal because of "the existence of an illegal market for forms of false identification[.]" 418 N.W.2d at 59. The Ortega Court disagreed, finding that since the blank forms were not public documents and void on their face, they could not be considered forgeries. A person would first have to complete the license before it appeared

³ Mr. Singh does not contend that in order to be "complete," every "i" must be dotted or every "t" must be crossed. Rather, the writing must at least appear complete enough to be a symbol "of value, right, privilege, or identification." Utah Code Ann. § 76-6-501(2); cf. Utah Code Ann. § 41-2-102(13); Utah Code Ann. § 41-2-404(1); State v. Ortega, 418 N.W.2d 57, 59 (Iowa 1988) ("blank computer printed forms [driver's licenses], having no legal efficacy, are void on their face [as they] evidence no legally enforceable right and therefore have no capacity to deceive anyone concerning rights or liabilities affected by government").

to "evidence the completed acts of any public servants"

Id. Prior to their completion, no forgery exists.

Utah's Code may not explicitly list the common law element of "legal efficacy" in its forgery statute, see Utah Code Ann. § 76-6-501, but the forgery charges nonetheless require the "writing" to symbolize a right or privilege issued by the government. Id. No privilege attaches to an invalid license. Conspicuously displayed on each license is the following notation: "Not Valid Without Licensee's Signature." See State's Exhibits 1-3. The plain language of the permit unequivocally demands that the licensee sign the permit. As long as the licensee's signature line remains blank, the license cannot be considered a valid writing issued by the government. Hence, even if an authorized examiner and director signed their names and filled in all the necessary information, a license lacking the licensee's signature would still appear invalid. See State's Exhibits 1-3.

The licenses here contained far more blank spaces than a licensee's signature line. All the spaces identifying the licensee were left blank. Facially void, the arresting officers even admitted that the confiscated forms were not useable in their present form as temporary driver's permits. (R 32); (T 68, 79). The numerous blank spaces made it apparent that the licenses had not been issued by the government. Cf. Utah Code Ann. § 41-2-404(1). Absent completion of the pertinent identifying information, the partially completed licenses did not appear to be symbols "of value,

right, privilege, or identification." Utah Code Ann.

§ 76-6-501(2). No "writing" therefore existed.

Moreover, as a practical matter, no one⁴ would accept such a license as evidence of a privilege. For example, if an officer stopped an unlicensed driver who produced one of Mr. Singh's licenses, the officer would not consider the license to have been issued by the government. The Division of Motor Vehicles would not issue a predominately blank license, nor allow the licensee to independently fill in the necessary information. Cf. Utah Code Ann. § 41-2-404(1). No "writing," and consequently, no forgery exists when the driver's license remains substantially incomplete. Only when, and if, the unlicensed driver fills in the blanks will the writing appear legally and governmentally issued. The evidence was insufficient to support the forgery convictions. See State's Exhibits 1-3; (T 58, 61, 78).

POINT II

THE DEFENDANT WAS ENTITLED TO CHARGE THE JURY WITH THE LESSER INCLUDED OFFENSES.

Assuming, arguendo, the trial court properly concluded that a "writing" issued by the government (the temporary driver's licenses) may be totally devoid of information identifying the

⁴ Indeed, if a minor attempted to buy alcohol with a license containing no indicia of identification (e.g. no age, name, or height), the minor would leave empty-handed. The minor's "license" would not satisfy the cashier because of its incomplete nature. Absent the inclusion of the required identification by the minor, the license would not be (nor purport to be) governmentally issued. Cf. Utah Code Ann. § 41-2-404.

applicant, the court nonetheless erred when it refused to instruct the jury with the defendant's requested instructions on Attempted Forgery, Prohibited Use of a License, and Theft by Receiving Stolen Property. (T 110-18); (R 60-81). "If there [is] any evidence, however slight, on any reasonable theory of the case under which defendant might be convicted of a lesser included offense, the trial court must, if requested, give an appropriate instruction." State v. Chesnut, 621 P.2d 1228 (Utah 1980) (emphasis in original); State v. Baker, 671 P.2d 152, 157 (Utah 1983) ("where proof of an element of the crime is in dispute, the availability of the "third option"--the choice of conviction of a lesser offense rather than conviction of the greater or acquittal--gives the defendant the benefit of the reasonable doubt standard").

The instruction for a lesser included offense "must be given if (i) the statutory elements of greater and lesser included offenses overlap to some degree, and (ii) the evidence provides a 'rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.'" State v. Hansen, 734 P.2d 421, 424 (Utah 1986) (construing State v. Baker, 671 P.2d 152, 159 (Utah 1983)); Utah Code Ann. § 76-1-402(4) (1990). The two pronged Baker analysis "should be liberally construed." Hansen, 734 P.2d at 424, especially where, as here, the defendant requested the lesser included offense instruction.⁵

⁵ The prosecution must show more compelling circumstances than the defendant when it requests the lesser included offense
-[footnote continued on next page]-

If a defendant requests a lesser included instruction, as was the case here, an evidence-based standard controls. . . . If the same facts tend to prove elements of more than one statutory offense and the evidence is ambiguous and susceptible to alternative explanations, the trial court must give the lesser included offense instruction if any one of the alternative interpretations provides both a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. . . . [I]n determining whether a rational jury could acquit on the greater charge and find guilt on the lesser charge, the court must view the evidence and the inferences that can be drawn from it in the light most favorable to the defendant.

State v. Velarde, 734 P.2d 449, 451 (Utah 1986) (emphasis added and footnotes omitted).

A. THE COURT SHOULD HAVE PROVIDED THE JURY WITH AN "ATTEMPTED FORGERY" INSTRUCTION.

The statutory elements of forgery and attempted forgery necessarily overlap with one another. See Utah Code Ann. §§ 76-4-101, 76-6-501; cf. State v. Hansen, 734 P.2d 421, 424 (Utah 1986) ("the test is whether the elements overlap at all"); State v. Brown, 694 P.2d 587, 589 (Utah 1984) (emphasis in original) ("there must be some overlap in the definitions of the two crimes, even though they need not meet the totally 'included' standard"). Thus, the first prong of Baker was satisfied.

5 -[cont'd]- instruction. State v. Hansen, 734 P.2d 421, 424 n.5 (Utah 1986). Unlike the minimal standard placed on the defendant, see id. at 424 ("the test is whether the elements overlap at all"), "when the prosecution seeks instruction on a proposed lesser included offense, both the legal elements and the actual evidence or inferences needed to demonstrate those elements must necessarily be included within the original charge offense. State v. Baker, 671 P.2d 152, 156 (Utah 1983) (emphasis in original).

The evidence presented at trial also satisfied the second prong. "Clearly, under Utah law, the crime of attempted forgery involves the same culpability and dishonesty as does the crime of forgery itself." State v. Ross, 782 P.2d 529, 531 (Utah App. 1989). Since Mr. Singh left most of the license blank, the jury may have believed that he did not fully satisfy the act of forgery.

Even if "legal efficacy" is not a required element of the forgery statute, the jury still may have considered the blank spaces significant enough to acquit Mr. Singh of forgery had the lesser included offense of attempted forgery been available. Mr. Singh's conduct may have been viewed as a "substantial step" towards the making, completing, or transferring of a writing which purported to be the act of another. Hence, there was "a rational basis for . . . acquitting the defendant of [forgery] and convicting him of [attempted forgery]." Baker, 671 P.2d at 159; cf. State v. Brown, 694 P.2d 587, 590 (Utah 1984) (if the jury could have accepted the defendant's testimony concerning a lesser included offense, "however unlikely that might have been," it was error to refuse the instruction). Both prongs were satisfied.

Without the attempted forgery instruction, the jury was left with two choices: guilty of forgery or complete acquittal. (R 117-18). Apparently believing that Mr. Singh had done something wrong, the jury opted for a conviction. Cf. Keeble v. United States, 412 U.S. 205, 213 (1973) (emphasis in original) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to

resolve its doubts in favor of conviction"); State v. Hansen, 734P.2d 421, 428 (Utah 1986) ("This is exactly the sort of forced choice that lesser included offense instructions are designed to avoid, and exactly the choice that the jury would not have had to make if [the lesser included offense] instruction had been given"). The trial court erred in refusing to give the attempted forgery instruction. (R 72-81).

The trial court attempted to justify its refusal, reasoning that forgery does not require a "transfer" and Mr. Singh did more than merely "attempt" the act of forgery. See (T 85). As explained above, even if the trial court was correct, the perceived completion of the crime provided no basis for refusing the defendant's "attempt" instruction. Cf. State v. Baker, 671 P.2d 152, 159 (Utah 1983) ("The court must only decide whether there is a sufficient quantum of evidence presented to justify sending the question to the jury, . . . if there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense, then the court should instruct the jury regarding the lesser offense").

Moreover, despite noting the abrogation of common law, see (T 85), the trial court's rejection of the attempted forgery instruction was ironically supported by a now outdated common law rule. In State v. Burks, 29 Utah 2d 378, 510 P.2d 532 (1973), the Court acknowledged that common law prohibited a defendant from being "convicted of the crime of attempt, if in fact the crime had been completed[.]" 510 P.2d at 533. Similarly, if the trial court here was indeed correct in believing that Mr. Singh had actually

consummated the crime of forgery, common law then would have precluded the court from charging him with attempted forgery.

However, since the common law prohibition is no longer in force,⁶ the court's decision was flawed. An individual may also be charged with "attempted forgery" notwithstanding the perceived or actual completion of the crime. The court must let the jury decide whether the defendant completed the crime or simply made an attempt.

B. THE COURT SHOULD HAVE PROVIDED THE JURY WITH A
"PROHIBITED USE OF A LICENSE" INSTRUCTION.

The trial court also erred when it rejected the defendant's Prohibited Use of a License instruction. (R 62-71); Utah Code Ann. § 41-2-133. "Prohibited Use of a License" forbids a person from causing or permitting the display of a fictitious license. Utah Code Ann. § 41-2-133(1); see also Utah Code Ann. § 41-2-133(2) (it is unlawful for a person to "lend or knowingly permit the use of a license issued to him, by a person not entitled to it"). "Forgery" similarly requires, inter alia, that a person act with the purpose to defraud or facilitate a fraud. Utah Code Ann. § 76-6-501(1). The trial court and the State both acknowledged the overlapping nature of the charges:

⁶ The Burks Court cited Utah Code Ann. § 76-1-30 (1953) as authority for rejecting the common law prohibition. See State v. Burks, 29 Utah 2d 378, 510 P.2d 532, 533 (1973). This statutory provision has since been repealed. Nevertheless, the existing statute which repealed and replaced the old provision also abrogates the common law. See Utah Code Ann. § 76-1-105 (1973 & Supp. 1990). Thus, the principles of Burks still hold true for the instant action.

[The State]: We couldn't charge under that statute [Utah Code Ann. § 41-2-133], Judge.

The Court: You could have under (1). You could have charged under 41-2-133. It's a misdemeanor for a person to display or cause or permit to be displayed or to have in possession any license knowing it is fictitious, [you] could have charged under that if you had wished to.

What you're saying is, you charged under the fraud statute because you had the transfer.

[The State]: And the additional element raised it to this charge [forgery].

(T 18).

The State's concerns were irrelevant. Even if the greater offense includes additional elements, the lesser offense may still be included. See State v. Hansen, 734 P.2d 421, 424 (Utah 1986) (requiring only "overlap to some degree"); State v. Baker, 671 P.2d 152, 159 (Utah 1983) ("where two offenses are related because some of their statutory elements overlap, and where the evidence at the trial of the greater offense includes proof of some or all of those overlapping elements, the lesser offense is an included offense under [Utah Code Ann. § 76-1-402](3)(a)"). Moreover, the court cannot, on the one hand, hold that Forgery does not require a transfer, (T 85), and then, on the other, reject the Prohibited Use of a License instruction because it did not contain the element of a "transfer." The first prong of Baker was satisfied.

As alluded to by the court, the second prong was also satisfied. Detectives Wright and Mays watched Mr. Singh, an individual not authorized to act on behalf of the State, partially complete a temporary driver's license. (T 76-77). Previously, on

November 27, 1989, and December 7, 1989, Mr. Singh possessed and sold Detective Wright a pair of similarly marked licenses.

(T 57-60). If these partially completed licenses were in fact valid and if, as discussed before the jury could have viewed Mr. Singh's conduct as falling short of the completed crime of forgery, the evidence provided a rational basis for acquitting him of the greater offense and convicting him of the included offense. Hansen, 734 P.2d at 424. The trial court erred in refusing Mr. Singh's proposed instructions. (R 62-71).

C. THE COURT SHOULD HAVE PROVIDED THE JURY WITH A
"THEFT BY RECEIVING STOLEN PROPERTY" INSTRUCTION.

Another instruction discounted by the trial court was Theft by Receiving Stolen Property. (R 60-61); Utah Code Ann. § 76-6-408; -412(1)(c). "A person commits theft if he receives, retains, or disposes of the property of another . . . or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof." Utah Code Ann. § 76-6-408(1). Forgery requires that a person act with the purpose to defraud or facilitate a fraud. Utah Code Ann. § 76-6-501(1). The overlapping element of fraudulent conduct thus satisfied the first prong.

Since the jury convicted Mr. Singh of a second degree felony, it must have necessarily believed that the writing was or purportedly had been "issued by a government, or any agency thereof[.]" Utah Code Ann. § 76-6-501(3)(a); (R 102, 104, 106, 108, 110); see State's Exhibits 1-3. When Mr. Singh sold the licenses,

the jury may have rationally believed that he "dispose[d] of the property of another knowing that it ha[d] been stolen" Utah Code Ann. § 76-6-408(1). As stated above, the jury may have also acquitted him of forgery. Because the second prong was therefore satisfied, the trial court should not have refused Mr. Singh's requested instructions. (R 60-61).

POINT III

THE DEFENDANT WAS ENTITLED TO INFORM THE JURY OF HIS THEORY OF THE CASE.

Assuming further that, for some reason, the defendant's requested instructions did not qualify as lesser included offenses, they still supported his theories and should have been considered by the jury.

The well-recognized general rule entitles a party to have his theory of the case submitted to the jury. Where there is evidence adduced to support a party's theory of the case, it is prejudicial error for the trial court to fail to instruct thereon. Nevertheless, the court cannot be said to have failed to properly instruct the jury when requested instructions are fully covered in other instructions given.

Watters v. Querry, 626 P.2d 455, 458-59 (Utah 1981); State v. Aly, 782 P.2d 549, 550 (Utah App. 1989) ("A criminal defendant is entitled to have the gist of his defense reflected in the instructions given to the jury, and the instructions should not incorrectly or misleadingly state the material rules of law"); State v. Torres, 619 P.2d 694, 695 (Utah 1980) ("We are not concerned with the reasonableness, nor the credibility of the defendant's evidence relating to his claim of self defense [the theory of the case as

long as] . . . there is any reasonable basis in the evidence to justify it").

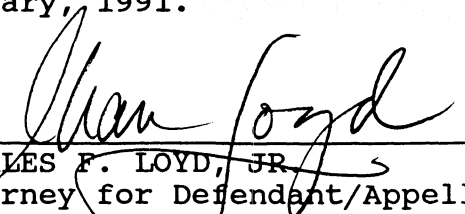
As noted above, the evidence reasonably supported the inclusion of the instructions on Attempted Forgery, Prohibited Use of a License,⁷ and Theft by Receiving Property. The defendant's requested instructions were not covered by the court's other instructions. The trial court erred when it rejected the defendant's theories.

⁷ Mr. Singh also noted that "Prohibited Use of a License" was more specifically tailored for the involved conduct than the generally worded Forgery statute. (T 14-16, 115); compare Utah Code Ann. § 41-2-133 with Utah Code Ann. § 76-6-501. As stated in Helmuth v. Morris, 598 P.2d 333 (Utah 1979), if a Controlled Substances Act provision "is specifically designed to prohibit the presentation of false or forged prescriptions" it governs over the more generally restrictive forgery statute. Id. at 335. Mr. Singh's proposed "Operators' License Act" provision should have similarly governed over the generally worded forgery statute. See id. ("where two statutes interdict the same conduct, but impose different penalties, the violator is entitled to the lesser punishment"); State v. Shondel, 22 Utah 2d 343, 453 P.2d 146, 148 (1969) ("where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser"). The trial court erred in using the statute which allowed the greater punishment.

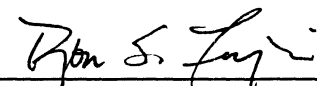
CONCLUSION

Appellant respectfully requests that this Court reverse his conviction because there was insufficient evidence to support the forgery charges or reverse the case and remand for a new trial with the addition of his proposed jury instructions.

SUBMITTED this 14th day of January, 1991.



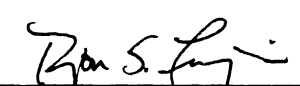
CHARLES F. LOYD, JR.
Attorney for Defendant/Appellant



RONALD S. FUJINO
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, RONALD S. FUJINO, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 400 Midtown Plaza, 230 South 500 East, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 14th day of January, 1991.



RONALD S. FUJINO

Delivered by _____

this ____ day of January, 1991.

ADDENDUM A

41-2-102. Definitions.

As used in this chapter:

- (1) "Cancellation" means the termination by action of the division of a license issued through error or fraud or for which necessary consent has been withdrawn.
- (2) "Class D license" means the class of license issued for vehicles not defined as commercial vehicles or motorcycles under this title.
- (3) "Class M license" means the class of license issued for a motorcycle as defined under this chapter.
- (4) "Commercial driver license (CDL)" means a license issued substantially in accordance with the requirements of Title XII, Pub. L. 99-570, the Commercial Motor Vehicle Safety Act of 1986, and in accordance with Part 7, Chapter 2, Title 41, which authorizes the holder to drive a class of commercial motor vehicle.
- (5) (a) "Commercial motor vehicle" means a motor vehicle designed or used to transport passengers or property if the vehicle:
 - (i) has a gross vehicle weight rating of 26,001 or more pounds or a lesser rating as determined by federal regulation;
 - (ii) is designed to transport more than 15 passengers, including the driver; or
 - (iii) is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.
 (b) The following vehicles are not considered a commercial motor vehicle for purposes of Part 7, Chapter 2, Title 41, the Uniform Commercial Driver License Act:
 - (i) equipment owned and operated by the United States Department of Defense when operated by any active duty military personnel and members of the reserves and national guard on active duty including personnel on full-time national guard duty, personnel on part-time training, and national guard military technicians and civilians who are required to wear military uniforms and are subject to the code of military justice;
 - (ii) vehicles controlled and operated by a farmer to transport agricultural products, farm machinery, or farm supplies to or from a farm within 150 miles of his farm but not in operation as contract or common motor carrier;
 - (iii) firefighting and emergency vehicles; and
 - (iv) recreational vehicles that are not used in commerce and are operated solely as family or personal conveyances for recreational purposes.
- (6) "Commissioner" means the commissioner of the Department of Public Safety.
- (7) "Denial" or "denied" means the withdrawal of a driving privilege by the division to which the provisions of Part IV, Chapter 12a, Title 41, Proof of Owner's or Operator's Security, do not apply.
- (8) "Disqualification" means either:
 - (a) the suspension, revocation, cancellation, denial, or any other withdrawal by a state of a person's privileges to drive a commercial motor vehicle;

- (b) a determination by the Federal Highway Administration, under 49 C.F.R. Part 386, that a person is no longer qualified to operate a commercial motor vehicle under 49 C.F.R. Part 391; or
- (c) the loss of qualification which automatically follows conviction of an offense listed in 49 C.F.R. Part 383.51.
- (9) "Division" means the Driver License Division of the Department of Public Safety.
- (10) "Drive" means:
 - (a) to operate or be in physical control of a motor vehicle upon a highway; and
 - (b) in Subsections 41-2-715(1) through (3), Subsection 41-2-715(5), and Sections 41-2-716 and 41-2-717, the operation or physical control of a motor vehicle at any place within the state.
- (11) "Farm tractor" means every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.
- (12) "Highway" means the entire width between property lines of every way or place of any nature when any part of it is open to the use of the public, as a matter of right, for vehicular traffic.
- (13) "License" means the privilege issued under this chapter to operate a motor vehicle.
- (14) "License certificate" means the evidence of the privilege issued under this chapter to operate a motor vehicle.
- (15) "Motor vehicle" means every self-propelled vehicle and every vehicle propelled by electric power obtained from overhead trolley wires, but not operated upon rails, except motorized wheel chairs and vehicles moved solely by human power.
- (16) "Motorcycle" means every motor vehicle, other than a tractor, having a seat or saddle for the use of the rider and designed to travel with not more than three wheels in contact with the ground.
- (17) "Nonresident" means a person who is not a resident of this state and who has not sojourned or engaged in any gainful occupation in this state for an aggregate period of 60 days in the preceding 12 months and also every person who is temporarily assigned by his employer to work in Utah.
- (18) "Operate" means to be in actual physical control of a motor vehicle.
- (19) "Operator" means any person who is in actual physical control of a vehicle.
- (20) "Owner" means a person other than a lienholder having an interest in the property or title to a vehicle. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person but excludes a lessee under a lease not intended as security.
- (21) "Person" means every natural person, firm, partnership, association, or corporation.
- (22) "Reportable violation" means an offense required to be reported to the Driver License Division as determined by the division and includes those offenses against which points are assessed under Section 41-2-128.
- (23) "Revocation" means the termination by action of the division of a licensee's privilege to operate a motor vehicle.

41-2-111. Temporary learner permit — Instruction permit — Commercial driver instruction permit.

(1) (a) The division upon receiving an application for a class D or M license from a person 16 years of age or older may in its discretion issue a temporary learner permit after the person has successfully passed all parts of the examination not involving the actual operation of a motor vehicle.

(b) The temporary learner permit allows the applicant, while having the permit in his immediate possession, to operate a motor vehicle upon the highways for six months from the date of the application in conformance with the restrictions indicated on the permit as determined by rules of the division.

(2) The division upon receiving an application may in its discretion issue an instruction permit effective for one year to an applicant who is enrolled in a driver education program that includes practice driving if the program is approved by the State Office of Education even though the applicant has not reached the legal age to be eligible for a license. The instruction permit entitles the permittee when he has the permit in his immediate possession to operate a motor vehicle, only when an approved instructor is occupying a seat beside the permittee.

41-2-133. Prohibited uses of license — Penalty.

It is a class B misdemeanor for a person to:

(1) display or cause or permit to be displayed or to have in possession any license knowing it is fictitious or has been canceled, denied, revoked, suspended, disqualified, or altered;

(2) lend or knowingly permit the use of a license issued to him, by a person not entitled to it;

(3) display or to represent as his own a license not issued to him;

(4) fail or refuse to surrender to the division upon demand any license which has been denied, suspended, disqualified, canceled, or revoked;

(5) use a false name or give a false address in any application for a license or any renewal or duplicate of the license, or to knowingly make a false statement, or to knowingly conceal a material fact or otherwise commit a fraud in the application; or

(6) permit any other prohibited use of a license issued to him.

41-2-404. Identification card — Contents — Specifications.

(1) The commissioner shall issue a card of identification which provides all the information contained in the application, other than place of birth, and a photograph of the applicant and facsimile of the applicant's signature.

(2) The card shall be of an impervious material, resistant to wear, damage, and alteration. The size, form, and color of the card is prescribed by the commissioner.

(3) At the applicant's request, the card may include a statement that the applicant has a special medical problem or allergies to certain drugs, for the purpose of medical treatment.

(4) The card may also indicate the applicant's intent to make an anatomical gift, under the same procedure as provided for an operator license under Subsection 41-2-121(3).

"This section specifically provides that a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was perpetrated by such person in pursuance of such attempt." State v. Burks, 29 Utah 2d 378. 510 P.2d 532, 533 (1973).

76-1-105. Common law crimes abolished.

Common law crimes are abolished and no conduct is a crime unless made so by this code, other applicable statute or ordinance.

History: C. 1953, 76-1-105, enacted by L. 1973, ch. 196, § 76-1-105; 1974, ch. 32, § 1.

76-1-402. Separate offenses arising out of single criminal episode — Included offenses.

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

76-4-101. Attempt — Elements of offense.

(1) For purposes of this part a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

(2) For purposes of this part, conduct does not constitute a substantial step unless it is strongly corroborative of the actor's intent to commit the offense.

(3) No defense to the offense of attempt shall arise:

(a) Because the offense attempted was actually committed; or

(b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

76-6-408. Receiving stolen property — Duties of pawnbrokers.

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be stolen, with a purpose to deprive the owner thereof.

76-6-412. Theft — Classification of offenses — Action for treble damages against receiver of stolen property.

(1) Theft of property and services as provided in this chapter shall be punishable:

- (a) as a felony of the second degree if the:
 - (i) value of the property or services exceeds \$1,000;
 - (ii) property stolen is a firearm or an operable motor vehicle;
 - (iii) actor is armed with a deadly weapon at the time of the theft;or
- (iv) property is stolen from the person of another;
- (b) as a felony of the third degree if the:
 - (i) value of the property or services is more than \$250 but not more than \$1,000;
 - (ii) actor has been twice before convicted of theft, any robbery, or any burglary with intent to commit theft; or
 - (iii) property taken is a stallion, mare, colt, gelding, cow, heifer, steer, ox, bull, calf, sheep, goat, mule, jack, jenny, swine, or poultry;
- (c) as a class A misdemeanor if the value of the property stolen was more than \$100 but does not exceed \$250; or
- (d) as a class B misdemeanor if the value of the property stolen was \$100 or less.

76-6-501. Forgery — "Writing" defined.

(1) A person is guilty of forgery if, with purpose to defraud anyone, or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he:

(a) Alters any writing of another without his authority or utters any such altered writing; or

(b) Makes, completes, executes, authenticates, issues, transfers, publishes, or utters any writing so that the writing or the making, completion, execution, authentication, issuance, transference, publication or utterance purports to be the act of another, whether the person is existent or nonexistent, or purports to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed.

(2) As used in this section "writing" includes printing or any other method of recording information, checks, tokens, stamps, seals, credit cards, badges, trademarks, money, and any other symbols of value, right, privilege, or identification.

(3) Forgery is a felony of the second degree if the writing is or purports to be:

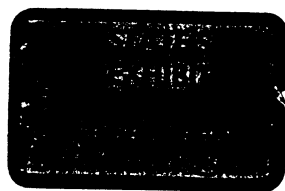
(a) A security, revenue stamp, or any other instrument or writing issued by a government, or any agency thereof; or

(b) A check with a face amount of \$100 or more, an issue of stocks, bonds, or any other instrument or writing representing an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise.

ADDENDUM B

89-104579
Channon Singh (SINGH)
11-27-89

1-B



UTAH STATE DEPARTMENT OF PUBLIC SAFETY
Driver License Temporary Counter Permit

DLD-50 (P-2023) Rev 2-87

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		<p>INSTRUCTION (LEARNER) PERMIT</p> <p><input type="checkbox"/> THIS PERMIT ALLOWS YOU TO DRIVE A MOTOR VEHICLE (EXCEPT MOTOR CYCLES) WHEN ACCOMPANIED BY A LICENSED DRIVER ONLY</p> <p><input type="checkbox"/> DRIVE A MOTORCYCLE WITHOUT PASSENGERS, DAYLIGHT HOURS ONLY, AND NOT TO DRIVE ON MAJOR ROADS</p> <p>EXAMINER _____</p> <p>EXPIRATION DATE 12-7-1990</p>			
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Metro Felony Evidence

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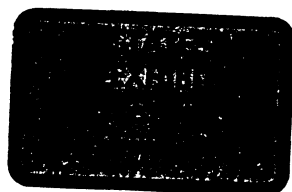
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UTAH STATE DEPARTMENT OF PUBLIC SAFETY
Driver License Temporary Counter Permit

DLD-50 (P-2023) Rev 2 87

CURRENT UTAH DRIVER LICENSE NO _____ ADULT <input type="checkbox"/> MINOR <input type="checkbox"/> CLASS <input type="checkbox"/> MOTORCYCLE <input type="checkbox"/>				NAME _____ ADDRESS _____ _____																						
(Not Valid Without Licensee's Signature)	DATE _____ 19 ____		BIRTH DATE _____		<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th colspan="4" style="text-align: center;">RESULTS OF EXAMINATION</th> </tr> <tr> <th style="width: 10%;">NO</th> <th style="width: 20%;">RESULT</th> <th style="width: 20%;">EXAMINER</th> <th style="width: 10%;">DATE</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">1</td> <td>IC</td> <td>PF</td> <td></td> </tr> <tr> <td style="text-align: center;">2</td> <td>CLASS</td> <td></td> <td></td> </tr> <tr> <td style="text-align: center;">3</td> <td></td> <td></td> <td></td> </tr> </tbody> </table> <p style="text-align: center; margin-top: 5px;">TEMPORARY DRIVING PERMIT</p> <p style="font-size: small;">When COMPLETED and SIGNED by a DRIVER LICENSE EXAMINER THIS IS YOUR TEMPORARY PERMIT TO DRIVE UNTIL YOU RECEIVE YOUR PERMANENT DRIVER LICENSE</p> <p style="font-size: small;">EXPIRATION DATE _____</p> <p style="font-size: small;">EXAMINER <i>Paul R. Smith</i></p> <p style="text-align: center; margin-top: 5px;">INSTRUCTION (LEARNER) PERMIT</p> <p><input type="checkbox"/> THIS PERMIT ALLOWS YOU TO DRIVE A MOTOR VEHICLE (EXCEPT MOTORCYCLES) WHEN ACCOMPANIED BY A LICENSED DRIVER ONLY</p> <p><input type="checkbox"/> DRIVE A MOTORCYCLE WITHOUT PASSENGERS DAYLIGHT HOURS ONLY AND NOT TO DRIVE ON MAJOR ROADS</p> <p style="font-size: small;">EXAMINER <i>Paul R. Smith</i></p> <p style="font-size: small;">EXPIRATION DATE _____</p>		RESULTS OF EXAMINATION				NO	RESULT	EXAMINER	DATE	1	IC	PF		2	CLASS			3			
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Signature _____ X _____ ERASURES ALTERATIONS AND/OR OBLITERATIONS WILL VOID THIS PERMIT AND MAY RESULT IN THE SUSPENSION OF YOUR DRIVING PRIVILEGE <div style="text-align: right; margin-top: 10px;"> <i>Paul R. Smith</i> DIRECTOR </div>																										